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91-468

No. 91-

IN THE
Supreme Court of the United States
October Term, 1991

CHABAD-LUBAVITCH OF VERMONT,
RABBI YITZCHOK RASKIN,
Petitioners,

v.

CITY OF BURLINGTON, VERMONT, BOARD OF PARKS AND RECREATION COMMISSION,
Respondents,

—and—

AMERICAN CIVIL LIBERTIES FOUNDATION OF VERMONT, INC., MARK A. KAPLAN, ESQ., REVEREND ROBERT E. SENGHAS,
Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the display of a privately sponsored Chanukah menorah in a city park that is a traditional public forum, where private organizations have always been allowed to erect displays and conduct religious programs, violates the Establishment Clause because the park "is linked to the seat of municipal government."

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OPINIONS BELOW

The opinion of the court of appeals (Appendix A, pp. 1a - 7a, *infra*) is reported at 936 F.2d 109 (2d Cir. 1991). The opinion of the district court (Appendix B, pp. 8a - 20a *infra*) is reported at 754 F. Supp. 372 (D. Vt. 1990).

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1991. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

1. The History of the Menorah Display.

Every December since 1986, the City of Burlington, Vermont, has permitted Chabad-Lubavitch of Vermont ("Lubavitch"), a private religious organization, to display its menorah in City Hall Park during the eight-day holiday of Chanukah. The menorah, a nine-pronged candelabrum, is the primary visual religious symbol for the annual Jewish holiday of Chanukah. Lubavitch's menorah, approximately 12 feet wide and 16 feet high, has alway been erected with no government involvement and with no expense to the City. A sign stands in front of the menorah stating that it is sponsored by Lubavitch of Vermont.

2. Appearance and Use of City Hall Park.

City Hall Park ("the Park") is located in the center of the downtown commercial area of Burlington, Vermont's largest city. It has served as Burlington's town square since 1798, when title was transferred to the public and the City was authorized to act as trustee for the property. It is approximately two and one-half acres in size and is bounded on three sides by streets with numerous business establishments, including banks, restaurants, pharmacies, beauty salons and an Army-Navy surplus store. The only side not bounded by a street is the east side, where Merchant's Bank, the Old Fire Station, and, in the southeast quadrant, City Hall, are located. There are cement public sidewalks along all four sides of the

Park, and there is a great deal of both vehicular and pedestrian traffic around the Park.

It is undisputed that the Park is a traditional public forum. There is a long history of unrestricted access to the Park for all types of expression by private individuals and groups, including private displays. The district court expressly found (pp 10a - 11a, *infra*):

> Private organizations have always been allowed to erect private displays in the Park. For example, a non-profit educational foundation known as "Beyond War" has erected a permanent "Peace Garden," including a world globe mounted on a wooden post, for the purpose of promoting world peace, and there are unattended, solitary war monuments permanently erected by private groups. In addition, private groups have been permitted to erect temporary structures, such as tents, as part of their activities lasting more than a single day.

The City has also approved various religious activities in the Park, including, for example, a "Jesus Rally," an anti-abortion rally held by religious groups, and a vigil sponsored by a local Catholic group.

3. The Secular Display in the Park.

The City approved an application submitted in early December 1990 by a private citizen, Stephen C. Brooks, to erect a holiday display in the Park from December 10 through January 2. The Brooks display was composed of two connected signs, each of which was four feet by eight feet in size. The signs were erected four feet off the ground and were joined at an angle so that they measured slightly less than sixteen feet across.

The district court described the Brooks sign as follows (pp. 11a - 12a, *infra*):

> One sign of the Brooks display has "SEASONS GREETINGS!" and "AN AMERICAN SALUTE TO LIBERTY!" printed in large letters. In smaller letters is printed: "During this holiday season, let all of us be reminded that we are the keepers of the flame of liberty. It is our legacy of freedom which all of the world looks upon for faith in the future." A dove circling the globe is depicted. The other sign has the headings "PEACE ON EARTH" and "HAPPY HOLIDAYS!" and lists the word "peace" in eight different languages. The sign includes a stylized picture of an angel. Both signs state in small letters "Sponsored by Stephen C. Brooks."

The Brooks display was located on the north edge of the Park facing College Street so that it was clearly visible to all travelers on that street and on the adjacent sidewalk.

4. Lubavitch's Application.

By letter dated November 28, 1990, Lubavitch sought permission from the City to display its menorah alongside the Brooks display as part of a combined, private holiday display. As proposed, the menorah would have been erected a few feet to the west of the Brooks display, in the northwest corner of the Park farthest from City Hall. In addition, it would have been positioned so that its front was directly perpendicular to City Hall. Hence an observer facing the front of the menorah would not have a direct view of City Hall in the background.

5. The City's Response.

The City was unwilling to grant permission to Lubavitch without a judicial ruling that would protect it against a claim for attorneys' fees by the American Civil Liberties Foundation and other potential plaintiffs should a decision to grant a permit be challenged and overturned. Accordingly, the City initiated an action in the district court seeking a declaratory judgment on the constitutionality of Lubavitch's proposed display. Lubavitch and the American Civil Liberties Foundation were named as defendants. The district court dismissed the City's lawsuit on December 5, 1990, on the ground, urged by the American Civil Liberties Foundation, that the controversy was not ripe for decision. *City of Burlington v. Vermont Organization for Jewish Education Lubavitch*, C.A. No. 90-317 (D. Vt.).

The Parks Board held a meeting on December 3, 1990, to consider Lubavitch's application. It withheld permission solely out of fear that approval would be found to violate the Establishment Clause and expose the City to liability for attorneys' fees. On December 6, 1990, following dismissal of its declaratory judgment action, the City formally denied Lubavitch's application based solely on the City's view that the Second Circuit's decision in *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990), rendered the combined holiday display impermissible under the Establishment Clause. The *Kaplan* opinion is reproduced as Appendix C to this petition (pp. 21a - 41a, *infra*).

6. The Rulings Below.

The district court ruled on December 17, 1990, that, in view of the Second Circuit's *Kaplan* decision, the display of the menorah was constitutionally impermissible. In *Kaplan*, the

Second Circuit had held by a 2-to-1 vote that the 1989 display of the Chabad menorah in close proximity to Burlington's City Hall conveyed a "message of government endorsement of religion in violation of the Establishment Clause" (p. 29a, *infra*) given the park's "close association with the seat of city government" (p. 33a, *infra*). While noting that the display would no longer be in close proximity to City Hall, the district court nonetheless found the display constitutionally barred, relying heavily on the fact that "the display was in a park the whole of which is associated with City Hall" (p. 19a, *infra*).[1] The court of appeals affirmed, principally because it viewed its *Kaplan* decision as controlling. The panel said: "Although Lubavitch wishes otherwise, neither this Court nor the Supreme Court has overturned *Kaplan*" (p. 6a, *infra*).

REASONS FOR GRANTING THE WRIT

1. There Is a Conflict Among The Circuits.

The *Kaplan* decision and the present case establish a constitutional rule in the Second Circuit that prohibits the display of a privately sponsored religious symbol in a public park identified with the "seat of government" even if the park is a "traditional public forum" in which other types of expressive activities, including religious gatherings, have always been permitted. The Sixth Circuit explicitly disagrees with the Second Circuit's rule and has recently permitted such private menorah displays in two rulings on stay applications. *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 308-09 (6th Cir. 1990); *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458 (6th Cir. 1991), *appeal*

[1]The menorah was thereafter displayed, with no objection from the City or from the ACLF, at the Church Street Marketplace, which is a public street in the heart of Burlington.

vacated as moot, No. 90-4084 (August 16, 1991).[2] The Sixth Circuit appropriately recognized that where presentation of speeches, religious meetings, or other uses has marked the use of a public square, "a reasonable person would view all such activities in a public forum as being in the context of use of the forum, not as an endorsement." 922 F.2d at 310.

Indeed, the Sixth Circuit has expressly stated its disagreement with the *Kaplan* majority, and its agreement with the dissent in that case, which would have found the menorah display to be constitutionally permissible. In *American Civil Liberties Union v. Wilkinson*, 895 F.2d 1098, 1102 (6th Cir. 1990), the Sixth Circuit characterized Judge Meskill's dissent in *Kaplan* (*see* pp. 35a - 41a, *infra*) as "persuasive." And in the Grand Rapids case, the Sixth Circuit said that "Judge Meskill had it about right" when he said that a "privately owned and maintained religious symbol, accompanied by a sign identifying its sponsor. . ., for a relatively short period of time in a traditional public forum does not convey a message of governmental endorsement of religion merely because the forum is located next to City Hall." 922 F.2d at 309.[3]

Cities in New York, Connecticut, and Vermont should not be governed by different constitutional rules for privately sponsored Chanukah displays than cities in Michigan, Ohio, Ken-

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[2]In the *Grand Rapids* case the court found no Establishment Clause violation even though the private display involved a menorah standing alone on a plaza "in the heart of the governmental building section of downtown Grand Rapids," surrounded by city hall, the county building, the federal courthouse, the county probate court, the police station, the city and county trial courts, and a Michigan state office building. *American United for Separation of Church and State v. City of Grand Rapids*, 1990 U.S. DIST. LEXIS 17581 (W.D. Mich. Dec. 27, 1990).

[3]A district court in the Eleventh Circuit also agreed with Judge Meskill's *Kaplan* dissent in a case involving a menorah display on the grounds of the State Capitol in Atlanta, Georgia. *See Chabad-Lubavitch of Georgia v. Harris*, 752 F. Supp. 1063, 1067 (N.D. Ga. 1990).

tucky, and Tennessee. Moreover, applications for such displays have been made and will continue to be made by Jewish groups across the country. Conflicting rulings from these courts can only result in promoting uncertainty and engendering litigation in those areas that come within neither Circuit's jurisdiction.

Each year's Chanukah holiday is an occasion for constitutionally protected expression by Jewish groups such as Lubavitch that wish to sponsor Chanukah displays at public forums. If their right to do so remains uncertain in the foreseeable future and is subject to repeated litigation and squarely conflicting judicial pronouncements of constitutional principle, religious expression is endangered and may be improperly suppressed. It is, therefore, critical that this Court resolve the constitutional uncertainty and decide, in an authoritative ruling, whether or not solitary[4] Chanukah menorahs may be barred from traditional public forums solely because those forums are adjacent to a city hall or other important governmental structure. *See Grand Rapids*, 922 F.2d at 309 (it would "seem odd" to rely on the proximity of government buildings and thereby exclude religious displays "from otherwise available public forums . . . simply because of the pervasive presence of government buildings in the centers of our major cities").

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[4]The court of appeals treated this as a case of a "solitary" menorah although it was displayed next to a secular display because the display from "most viewpoints in the Park," looked like "two blank, white sheets of plywood" (p. 3a, *infra*)

2. The Decision Below Conflicts With This Court's Rulings in *Widmar v. Vincent* and *Board of Education v. Mergens*.

The ruling below is also in conflict with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), which held that the Establishment Clause is not violated where a government merely allows private religious speakers to use a public forum under an "equal access" policy open to all speakers, there in a state university. That ruling was affirmed and extended last Term in the Court's decision in *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990), which applied the *Widmar* rule in the setting of an "equal access" policy for public high school student meetings. As Justice O'Connor noted in *Mergens*, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clause protect." 110 S. Ct. at 2372 (plurality opinion of Justice O'Connor) (emphasis in original); *see also* 110 S. Ct. at 2377-78 (opinion of Justice Kennedy).

The case at hand involves "private speech" in a traditional public forum where "[p]rivate organizations have always been allowed to erect private displays" (p. 10a, *infra*). The *Widmar* and *Mergens* standard therefore requires that the petitioners be granted equal access to the public forum. Indeed, the very same constitutional issue was before this Court — and was left unresolved because of the Court's equal division — in *Board of Trustees v. McCreary*, 471 U.S. 893 (1985).

The court of appeals tried to distinguish *Widmar* on the ground that the case "involved an open forum, with live speakers, in a public university" (p. 7a, *infra*). According to the court below, this differed constitutionally from the display of a religious symbol in a public park.

The court of appeals' distinction is unsound. A display in a public park that has been a traditional public forum looks *less* like governmental endorsement than the appearance of a live speaker in the governmentally controlled context of a public school. The menorah display is constantly accompanied by a sign identifying it as privately sponsored; the speaker in the public school is not as clearly distinct from his governmental surrounding. Moreover, the public is accustomed to hearing a multiplicity of private opinions expressed at a "traditional public forum." Public school students do not expect diverse private speakers in their classrooms. Yet Justice O'Connor had no difficulty in concluding that "secondary students are mature enough and are likely to understand that a school does not endorse or support speech it merely permits on a non-discriminatory basis." 110 S. Ct. at 2372. By ruling that the residents of Burlington, Vermont, cannot make such a distinction, the Second Circuit has brought itself into direct conflict with the *Mergens* and *Widmar* decisions.[5]

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[5]The Second Circuit's ruling is also in conflict with the outcome in recent litigation in this Court on stay papers, involving the menorah display in Pittsburgh that was found to be permissible when erected with government assistance in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Following *Allegheny County*, Pittsburgh refused to allow the displays, and the private owners, arguing that the site was a public forum, sued to force the city to grant permission for the menorah to be erected. On appeal to this Court, the lower court's order requiring Pittsburgh to permit the menorah display on public forum grounds was enforced by a 6-to-3 vote. *See Chabad v. City of Pittsburgh*, C.A. No. 89-2432 (W.D. Pa. Dec. 21, 1989) (granting injunction); *Chabad v. City of Pittsburgh*, No. 89-3793 (3d Cir. Dec. 21, 1989) (staying lower court order); *Chabad v. City of Pittsburgh*, 58 U.S.L.W. 3426 (U.S. Dec. 22, 1989) (Brennan, J., vacating stay); *Chabad v. City of Pittsburgh*, 110 S. Ct. 708 (1989).

CONCLUSION

This case presents a recurring constitutional issue in which there is a square conflict among the Circuits. It is important that the conflict be resolved soon.[6] A uniform rule will reduce future litigation and will prevent conflicting results in cases around the country involving efforts by Jewish residents to sponsor private displays in public forums. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1991

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[6]This case need not be held pending resolution of *Lee v. Weisman*, No. 90-1014. Even if the constitutional standard initially articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), were to be revised by this Court's decision in *Lee v. Weisman*, the ruling of the court of appeals is unlikely to be affected. And the precise question before this Court in *Lee v. Weisman* — *i.e.*, the constitutionality of a prayer invoking the Deity during a public high school graduation — has no direct bearing on the issue in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1428—August Term, 1990

(Argued April 29, 1991 Decided June 21, 1991)

Docket No. 91-7068

CHABAD-LUBAVITCH OF VERMONT, RABBI YITZCHOK RASKIN,

Plaintiffs-Appellants,

—v—

CITY OF BURLINGTON, VERMONT BOARD OF PARKS AND RECREATION COMMISSION,

Defendants-Appellees,

—v—

AMERICAN CIVIL LIBERTIES FOUNDATION OF VERMONT, INC., MARK A. KAPLAN, ESQ., REVEREND ROBERT E. SENGHAS,

Defendants-Intervenors-Appellees.

Before:

OAKES, *Chief Judge*, WINTER, *Circuit Judge*, and MUKASEY, *District Judge.**

* The Honorable Michael B. Mukasey, of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from an order denying a temporary restraining order and preliminary and permanent injunctive relief preventing appellees from denying appellants' application for a permit to display a menorah in City Hall Park in Burlington, Vermont. We affirm.

NATHAN LEWIN, David G. Webbert, Miller, Cassidy, Larroca & Lewin, Washington, D.C. *for Plaintiffs-Appellants.*

KEN A. SCHATZ, Office of the City Attorney and Corporation Counsel, Burlington, Vermont *for Defendants-Appellees.*

RICHARD T. CASSIDY, Hoff, Agel, Curtis, Pacht & Cassidy, Burlington, Vermont *for Defendants-Intervenors-Appellees.*

Per Curiam:

Chabad-Lubavitch of Vermont and Rabbi Yitzchok Raskin (collectively "Lubavitch") appeal from an order of the United States District Court for the District of Vermont, Fred I. Parker, *Judge*, denying a temporary restraining order and preliminary and permanent injunctive relief preventing the City and the State Board of Parks and Recreation Commission (collectively the "City") from denying Lubavitch's application for a permit to display its menorah in City Hall Park (the "Park").[1] The district court's decision stemmed from its

1 Via a last-minute stipulation, dated April 4, 1991, the parties agreed to consolidate the hearing on the preliminary injunction with a trial on the merits.

on-site viewing of the menorah, which Lubavitch temporarily erected in the Park on December 11, 1990, next to a secular display. Presumably, the parties intend that the facts stipulated to in the district court remain part of the record on appeal. The most significant of these facts include: 1) the menorah is a religious symbol; 2) the Park is a traditional public forum; 3) the City has traditionally granted permits for private organizations to erect private, secular displays in the Park; 4) the City has allowed various religious activities in the Park since 1982, including a "Jesus Rally," a festival of gospel singing and music; 5) the City approved the application of a private citizen, Stephen C. Brooks, to erect a secular, holiday display in the Park from December 10, 1990 to January 2, 1991; 6) the Brooks display was composed of two connecting signs, each printed on a four-foot by eight-foot plywood board; 7) one of Brooks's signs read "Season's Greetings" and "An American Salute to Liberty," while the other declared "Peace on Earth" and "Happy Holidays;" 8) Brooks placed his display a few feet from the College Street sidewalk on the north edge of the Park; 9) from most viewpoints in the Park, the Brooks display appeared as two blank, white sheets of plywood; 10) Lubavitch sought permission from the City to display the menorah alongside the Brooks display as part of a combined holiday display; 11) in its proposed location, the menorah was to stand a few feet to the west of the Brooks display; 12) from most vantage points in the Park, the menorah would be visible and identifiable, and there were numerous views from which both the menorah and City Hall would remain in the field of vision; 13) the menorah would have an unlighted sign, viewable from only one side, stating that it was sponsored by Lubavitch; 14) Lubavitch would

erect the menorah with no involvement by, or cost to, the City; 15) the City denied Lubavitch's application based on its view that the combined holiday display would violate the Establishment Clause; and 16) the City Attorney expressed a willingness to Rabbi Raskin to aid Lubavitch in acquiring a permit to display the menorah in the Church Street Marketplace, a section of a street in the heart of the City in which a large Christmas tree is traditionally placed during the holiday season.

On April 4, 1991, the parties also stipulated to several other facts. The April 4 stipulation provides that: 1) Lubavitch erected the menorah in Battery Park, a municipal park approximately one-half mile from the Park from December 11, 1990 through December 19, 1990; 2) the City issued a permit to Lubavitch for this display; 3) Lubavitch affixed the proposed sign, indicating its sponsorship of the display, to the menorah; 4) Rabbi Raskin lighted the menorah several times while it was displayed in Battery Park in the presence of members of his congregation; and 5) Brooks maintained his display in the Park from December 11, 1990 through January 11, 1991.

DISCUSSION

Chanukah 1990 has come and gone, compelling us first to ask whether this case is moot. We believe that we may properly exercise jurisdiction over Lubavitch's claim because it is "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). The question is "capable of repetition" insofar as Lubavitch intends to seek a permit to display a menorah in the Park every year at Chanukah. Given the short length of Chanukah

and the relatively slow pace of litigation, moreover, if the City denies Lubavitch's application next year it is highly improbable that the question will reach us before that Chanukah has passed also. Indeed, here, Lubavitch filed its complaint on December 7, 1990, the district court issued its ruling on Lubavitch's motion for a temporary restraining order on December 18, 1990, and Lubavitch filed its notice of appeal soon thereafter. Only now, however,—some four months later—are we able to consider the matter on appeal. As such it seems clear that this question is "capable of repetition, yet evading review." *Id.* We limit our analysis, however, to the constitutionality of the display in the Park because the legality of the display in Battery Park is not before us.

Here, as in *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990), the issue on appeal is whether the City may allow Lubavitch to display a menorah, measuring approximately 12 feet wide and 16 feet high, unattended in the Park. Relying on *County of Allegheny v. American Civil Liberties Union*, ____ U.S. ____, 109 S. Ct. 3086 (1989), we held in *Kaplan* that the display of an unattended, solitary, semi-permanent, religious symbol in the Park, given the Park's "close association with the seat of city government," violates the Establishment Clause. 891 F.2d at 1030. In a futile attempt to ward off judicial *deja vu*, Lubavitch cites inconsequential factual differences between *Kaplan* and this case. Specifically, Lubavitch emphasizes that the permit application proposed to place the menorah next to a secular display, and that, because the proposed location of the menorah was farther from City Hall than the location of the menorah in *Kaplan*, City Hall would not appear as a

backdrop to the menorah when viewed from most vantage points. With regard to the first distinction, Lubavitch unsuccessfully attempts to liken the menorah's proximity to the Brooks display to the combined menorah-Christmas tree display bearing the message "salute to liberty" that the Court upheld in *Allegheny*. However, the majority in *Allegheny* upheld the display because, when viewed as a whole, the display did not leave the viewer with the sense that the government endorsed any particular religion. *See* 109 S. Ct. at 3111-15 (opinion of Blackmun J.); *id.* at 3122-24 (opinion of O'Connor, J.); *id.* at 3138-40 (opinion of Kennedy, J. joined by Rehnquist, C.J., White, J., and Scalia, J.). Here, by contrast the viewer could not view the menorah and the Brooks displays "as a whole" because they were not to appear as a single display, nor so far as appears from the record were they originally conceived as a unitary symbol. Moreover, the menorah, with its inherently religious message, was visible from almost all vantage points, whereas the Brooks display looked like nothing more than two blank pieces of plywood from almost all vistas. As to Lubavitch's second factual distinction, every square foot of the Park is linked to the seat of municipal government, and any attempt to carve the Park into areas that do or do not have a direct view of City Hall is therefore meaningless for purposes of the Establishment Clause.

Lubavitch's legal arguments fare no better than its factual ones. Although Lubavitch wishes otherwise, neither this Court nor the Supreme Court has overturned *Kaplan*. Contrary to Lubavitch's contention, the Supreme Court's order in *Chabad v. Pittsburgh*, 110 S. Ct. 708 (1989), amounts to nothing more than an enforcement of its ruling that the proposed display in

Allegheny did not violate the Establishment Clause. *See id.* We assume that if the Supreme Court had wanted to change an area of law as complex as the Establishment Clause, it would have done so through a written opinion, or opinions, rather than via an order. In addition, *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990), is factually distinguishable from this case for the same reason that its predecessor, *Widmar v. Vincent*, 454 U.S. 263 (1981), was distinguishable from *Kaplan*: it involved an open forum, with live speakers, in a public university. *Mergens*, 110 S. Ct. at 2372; *Kaplan*, 891 F.2d at 1030. As we observed in *Kaplan*, " 'an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices'. . . . The same cannot be said be said of the City's permission to display an unattended, solitary religious symbol in City Hall Park, given that Park's close association with the seat of city government." *Kaplan*, 891 F.2d at 1030 (citation omitted).

Accordingly, we affirm the order of the district court.

APPENDIX B

CHABAD-LUBAVITCH OF VERMONT, Rabbi Yitzchok Raskin, Plaintiffs,

v.

CITY OF BURLINGTON, Vermont Board of Parks and Recreation Commission, Defendants,

v.

AMERICAN CIVIL LIBERTIES FOUNDATION OF VERMONT, INC., Mark A. Kaplan, Esq., Reverend Robert E. Senghas, Defendants/Intervenors.

Civ. A. No. 90-327

United States District Court,
D. Vermont.

Dec. 18, 1990

David G. Webbert, Miller, Cassidy, Larroca & Lewin, Washington, D.C., Robert D. Rachlin, Christopher D. Roy, Downs, Rachlin & Martin, Burlington, Vt., for plaintiffs.

John L. Franco, Jr., Burlington, Vt. for defendants.

Richard T. Cassidy, Hoff, Agel, Curtis, Pacht & Cassidy, Burlington, Vt., Steven K. Green, South Royalton, Vt., for defendants/intervenors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

PARKER, District Judge.

This Court is presented once again with the question of the constitutionality of the display of a sixteen-foot tall menorah

in City Hall Park in downtown Burlington, Vermont, during the eight days of Chanukah. In *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029-30 (2d Cir.1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 2619, 110 L.Ed.2d 640 (1990), the Second Circuit Court of Appeals, relying on the recent decision of the United States Supreme Court in *County of Allegheny v. Amerian Civil Liberties Union*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), held that the unattended, solitary display of the menorah "some 60 feet away from the westerly steps of City Hall" in Burlington was in violation of the Establishment Clause of the First Amendment.[1] In light of a number of factual differences between the displays of past years, at issue in *Kaplan*, and the display proposed for view this Chanukah season, the question of the display's constitutionality must be determined anew.

On December 7, 1990, plaintiffs requested a Temporary Restraining Order and preliminary and permanent injunctive relief preventing the City of Burlington and the Vermont Board of Parks and Recreation Commission (hereafter "City") from denying plaintiffs' application for a permit to display their menorah in City Hall Park. The American Civil Liberties Foundation of Vermont, Inc., Mark A. Kaplan, Esq. and Reverend Robert E. Senghas were granted status as intervenors under Fed.R.Civ.P. 24(a).

A hearing was held on December 10 and 11, 1990. The Court issued an oral ruling from the bench on the afternoon of the 11th finding that the display of the menorah as proposed would be unconstitutional. The following findings of fact and conclusions of law supplement that ruling.

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Establishment Clause has long been held applicable to the states. *See Wallace v. Jaffree*, 472 U.S. 38, 48-55, 105 S.Ct. 2479, 2485-89, 86 L.Ed.2d 29 (1985).

FINDINGS OF FACT

Based on a stipulation of facts entered by the parties on December 10, 1990, as well as evidence received through testimony, exhibits, and an on-site view of the menorah as proposed for display in City Hall Park held on December 11, the Court finds as follows.

1. Every December since 1986, the City has permitted the religious Jewish organization, Chabad-Lubavitch of Vermont, to display its private menorah in City Hall Park in downtown Burlington[2] during the eight days of Chanukah. The two and one-half acre park is bounded on the east by City Hall and two other buildings, and by streets on its other three sides.

2. The menorah, a nine-pronged candelabra, is the primary visual and religious symbol associated with Chanukah, an annual Jewish holiday celebrating the rededication of the Temple of Jerusalem in ancient times.[3]

3. This year Chanukah is celebrated from sundown on Tuesday, December 11, until sundown on Wednesday, December 19.

4. The menorah erected each year, and proposed for display this year, was constructed in Burlington of wrought iron and measures approximately 12 feet wide by 16 feet high.

5. The Park is a traditional public forum and the site of considerable "First Amendment" activity.

6. Private organizations have always been allowed to erect private displays in the Park. For example, a non-profit educa-

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[2]The park and environs are described in *Kaplan v. City of Burlington*, 700 F.Supp. 1315, 1317-18 (D.Vt. 1988) (Billings, J.).

[3]The significance of Chanukah and the menorah are discussed in *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. at 3095-97, and sources cited.

tional foundation known as "Beyond War" has erected a permanent "Peace Garden," including a world globe mounted on a wooden post, for the purpose of promoting world peace, and there are unattended, solitary war monuments permanently erected by private groups. In addition, private groups have been permitted to erect temporary structures, such as tents, as part of their activities lasting more than a single day.

7. Varied activities sponsored by religious organizations have also been approved in the park since 1982, including a "Jesus Rally," a festival of gospel singing and music, a festival of Israeli folk dancing and acoustic music sponsored by a Christian congregation, a "Bike for Peace" rally held by the First Unitarians, an anti-abortion rally held by religious groups, a vigil commemorating the explosion of the atomic bomb at Nagasaki sponsored by a local Catholic group, and a food and clothing distribution to the poor by the Maranatha Church of Williston, Vermont.

8. This year the City approved the application of a private citizen, Stephen C. Brooks, to erect in City Hall Park from December 10 through January 2, a holiday display (hereafter "Brooks display") that celebrates primarily the secular values of peace and liberty.

9. The Court viewed the Brooks display in location on December 11. It is composed of two connected signs, each printed on a four-foot by eight-foot plywood board. The two boards are mounted on posts approximately eight feet tall, the bottom long edge of each board clearing the ground by about four feet, and the posts are set so that the two boards, joined along their four-foot edge, form an obtuse angle—viewed from overhead, the display would appear as a wide "V" slightly less than sixteen feet across.

10. One sign of the Brooks display has "SEASON'S

GREETINGS!" and "AN AMERICAN SALUTE TO LIBERTY!" printed in large letters. In smaller letters is printed: "During this holiday season, let all of us be reminded that we are the keepers of the flame of liberty. It is our legacy of freedom which all of the world looks upon for faith in the future." A dove circling the globe is depicted. The other sign has the headings "PEACE ON EARTH" and "HAPPY HOLIDAYS!" and lists the word "peace" in eight different languages. The sign includes a stylized picture of an angel. Both signs state in small letters "Sponsored by Stephen C. Brooks."

11. The Brooks display is erected a few feet from the College Street sidewalk on the north edge of City Hall Park. The messages on the signs are visible to passersby on College Street and the adjacent sidewalk, but not from elsewhere in the Park or the surrounding streets. Indeed, from most viewpoints within the Park, only the back of the display is visible, and appears as two blank white sheets of plywood held upright on posts.

12. During the Court's view of the site, the menorah was temporarily erected in its proposed location. It stood a few feet to the west of the Brooks display, slightly farther back from College Street. The menorah is sixteen feet tall but is less wide than the Brooks display and, by its nature, does not block a viewer's vield of vision as does the Brooks display. While the two displays were in close proximity, neither clearly overshadowed the other. However, from numerous vantage points throughout the Park, the menorah was visible and identifiable, while the Brooks display, as noted, appeared only as blank plywood.

13. The menorah was (and would be, if the City were required to grant a permit) positioned so that the wide "face" of the candelabra was parallel to the line of vision of a viewer

standing on the sidewalk of College Street looking at the menorah with City Hall forming the backdrop, looking, that is, in a southeasterly direction. Such a viewer would see the menorah edge-on, rendering it less obtrusive. Plaintiffs attempted, in short, to display the menorah in a manner designed, given the confines of City Hall Park, to avoid its association with City Hall and city government. However, there are numerous views where both the "face" of the menorah and City Hall remained in the field of vision.

14. The menorah would be erected along with a sign stating that it is sponsored by Lubavitch of Vermont. The unlighted sign is visible from College Street.[4]

15. As in the past, the menorah would be erected with no government involvement and no expense to the City.

16. By letter dated November 28, 1990, plaintiffs sought permission from the City to display the menorah alongside the Brooks display as part of a combined holiday display.

17. On November 30, 1990, the City filed a Complaint for declaratory relief with this Court indicating that it would not grant plaintiffs' permit application unless the Court authorized such action.

18. Although the Parks Board held a meeting on December 3, 1990 to consider plaintiffs' application, it withheld permission solely out of concern that such an approval would violate the Establishment Clause and expose the City to the risk of liability for attorneys' fees.

19. On December 5, 1990, this Court dismissed the suit filed by the City as unripe.

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[4]Plaintiffs have indicated they would consider lighting the sign on the menorah if that were necessary to ensure the constitutionality of the display. The visibility of the sign during evening and night hours is not a critical factor in the Court's decision, however.

20. On December 6, 1990, counsel for the City sent a letter to counsel for plaintiffs advising them that the City had formally denied plaintiffs' application based solely on the City's view that the combined holiday display would likely fail under the Establishment Clause.

21. Burlington has numerous other parks that are not so closely associated with city government.

22. A large Christmas tree adorns the Church Street Marketplace, a section of Church Street closed to vehicular traffic. The Marketplace is the heart of Burlington's shopping district.

23. City Attorney John Franco expressed his willingness to Rabbi Raskin of Chabad-Lubavitch to aid plaintiffs in acquiring a permit for display of the menorah in the Marketplace.

24. In past years, plaintiffs have held a public lighting ceremony at the menorah in City Hall Park. Rabbi Raskin agreed to forego the ceremony this year if the Court were to find that the display was otherwise constitutional.

CONCLUSIONS OF LAW, OPINION AND ORDER

The City's refusal to permit plaintiffs to display their menorah in City Hall Park unquestionably burdens the rights of plaintiffs to free speech and free exercise of religion under the First Amendment. As the restriction is based upon the content — the religious import — of plaintiffs' speech in a public forum, it will not pass constitutional muster unless it is necessary to serve a compelling governmental interest and is narrowly drawn to achieve that interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 945-46, 74 L.Ed.2d 794 (1983). The only governmental

interest asserted by the City here, of course, is the avoidance of endorsing religion in violation of the Establishment Clause. "Observance of the constitutional mandate of the Establishment Clause may properly be characterized as a compelling governmental interest, and a prohibition limited to displays of unattended, solitary religious symbols on public property would be narrowly tailored to serve that end, since it would allow the continued use of City Hall Park for all other uses." *Kaplan*, 891 F.2d at 1030 (citation omitted).

It is clear, under *Kaplan*, that the unattended, solitary and semi-permanent display of plaintiffs' menorah in close proximity to City Hall in Burlington's City Hall Park "conveys a message of government endorsement of religion in violation of the Establishment Clause," *id.* at 1028, "given that Park's close association with the seat of city government," *id.* at 1030. The doctrine's rationale is explained in *Allegheny:*

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

109 S.Ct. at 3101 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 1366-67, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)).

It is also evident, however, that constitutional questions in this area closely turn on the factual context of the religious display at issue. See *id.* 109 S.Ct. at 3102 (opinion by Blackmun, J.) (constitutionality of religious display depends on particular physical setting). Our decision in the present case thus requires an assessment of the significance of the dif-

ferences of setting between the display proposed this year and the displays found unconstitutional in *Kaplan*.

Two differences are obvious and are emphasized by plaintiffs. First, plaintiffs attempted this year to exhibit the menorah next to the Brooks display, which bears a primarily secular holiday message. Second, plaintiffs planned to exhibit the menorah on the north edge of the Park near College Street, farther from City Hall than the displays of past years. As a result, City Hall would not appear as a backdrop to the menorah when viewed from most vantage points. We agree with plaintiffs that these facts have constitutional significance, and might, in another case, be dispositive. We conclude, nonetheless, that under all the factual circumstances of this case the proposed display would convey a message to an objective observer of government endorsement.

We evaluate first the impact of the Brooks display. In *Allegheny*, the Supreme Court considered the constitutionality of two displays on public property in downtown Pittsburgh. The first, a creche depicting the Christian nativity scene, was placed prominently by itself inside the Allegheny County Courthouse. Five members of the Supreme Court found the display unconstitutional. 109 S.Ct. at 3104-05. The second display was an 18-foot menorah owned by Chabad, erected just outside the City-County building next to the city's 45-foot decorated Christmas tree, along with a sign bearing a secular "salute to liberty." Six member of the Court found that the display did not offend the Establishment Clause. *Id.* at 3111-15 (opinion by Blackmun, J.), 3122-24 (opinion by O'Connor, J.), 3138-40 (opinion by Kennedy, J., joined by Rehnquist, C.J.,, White and Scalia, JJ.). Both Justices Blackmun and O'Connor, the "swing votes" in this instance, emphasized the presence of the Christmas tree in upholding Pittsburgh's decision to allow the display of the menorah outside a government building. Blackmun wrote:

> [T]he relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. . . .
>
> The Christmas tree, unlike the menorah, is not itself a religious symbol. . . . . The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.
>
> *The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position* beneath the middle archway in front of the Grand Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than *vice versa*. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both Christian and Jewish faith, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.

Id. at 3133-14 (emphasis added) (footnote omitted).

Justice O'Connor disagreed with much of Justice Blackmun's analysis, observing that it "obscures the religious nature of

the menorah," but she agreed with his conclusion that "the city of Pittsburgh's combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty does not have the effect of conveying an endorsement of religion." *Id.* at 3122.

> By accompanying its display of a Christmas tree — a secular symbol of the Christmas holiday season — with a salute to liberty, and *by adding a religious symbol* from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.... . . .
>
> In short, in the holiday context, this combined display ***in its particular physical setting*** conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs. . . .

Id. at 3123-24 (emphasis added).

Under the views of either justice, it does not appear that the "combined display" in the present case is closely analogous to the Pittsburgh display upheld in *Allegheny*. Unlike a Christmas tree, the Brooks display is identifiable only from one general direction. More important, it does not overshadow the menorah — indeed, it is half the height of the menorah. From many areas within and around the Park, the menorah appears to stand alone, or, at best, adjacent to two pieces of white plywood. An objective viewer could not reasonably conclude that a religious symbol was "added to" a dominant secular display in this instance, only to achieve a celebration of a secular "winter-holiday season," in Justice Blackmun's words, or a "message of pluralism," in Justice O'Connor's. Therefore, we are unable to conclude that the presence of the Brooks display cures the constitutional infirmity of the menorah as proposed for display in City Hall Park.

The second important consideration is the location of the menorah within the Park. In *Kaplan*, the Second Circuit held invalid the display of the menorah "located only some 60 feet away from the westerly steps of City Hall; from the general direction of the westerly public street, the menorah appeared superimposed upon City Hall." 891 F.2d at 1029-30. We do not believe that the proximity to the buiding is as critical as the fact that the display was in a park the whole of which is associated with City Hall. As stated in *Kaplan:* "The facts here with regard to the menorah are very much like those in *Allegheny* with regard to the creche. The menorah, like the creche in that case, is displayed alone on public property closely associated with a core government function." *Id.* 897 F.2d at 1028. The court also noted: "City Hall is closely identified with this particular city park, as its very name and proximity to the seat of municipal authority suggest." *Id.* at 1029 n. 5. Furthermore, while there are fewer angles from which the menorah in its proposed site this year appeared superimposed upon City Hall, it remains that from at least one well-traveled place on College Street and its sidewalk, City Hall framed the view of the menorah. And from a considerably larger area, both City Hall and the menorah appeared together in the field of vision. We are thus unconvinced that this difference in factual setting from the *Kaplan* case is dispositive.

Certain additional factors of less significance in the present case deserve brief mention. First, while plaintiffs have in the past held a religious lighting ceremony in connection with the display, they have indicated their willingness to forego such a ceremony this year. A lighting ceremony might enhance the religious nature of the overall display, but its absence certainly does not turn a menorah into a secular symbol. It was the *unattended* display of a menorah that the court in *Kaplan* found objectionable.

Second, the menorah has a sign indicating that it is spon-

sored by the plaintiff Lubavitch. Since, however, the sign is legible only from one side and is unlit at night, and since it does not include a disclaimer of sponsorship or endorsement by the City, we think the presence of the sign is of little avail to plaintiffs. "Even if this display had been accompanied by an express disclaimer of City sponsorship and approval, the pervasive message of government endorsement communicated by this context would not be negated." *Id.* One cannot escape the fact that standing in the shadow of City Hall, one may view the menorah at a number of angles where it stands as a lone symbol, with neither the message on the Brooks display nor the sign claiming Lubavitch sponsorship in view.

Lastly the Court notes the existence of other sites for plaintiffs' display, including one potential location adjacent to a Christmas tree located on the Church Street Marketplace. That location would in all probability raise none of the constitutional concerns that arise in this case. We believe that a reasonable observer could well take this factor into account in deciding whether the proposed display represented an endorsement of the Jewish faith by the City of Burlington.

The Court concludes that plaintiffs' proposed display would violate the Establishment Clause of the United States Constitution. Accordingly, plaintiff's requested relief is DENIED.

APPENDIX C

Mark A. KAPLAN, Esq., Rabbi James S. Glazier and Reverend Robert E. Senghas, Plaintiffs-Appellants,

v.

CITY OF BURLINGTON, and Robert Whalen, Operations Manager of Parks and Recreation Department, Defendants-Appellees.

No. 469, Docket 89-7042.

United States Court of Appeals,
Second Circuit.

Argued Nov. 14, 1989.

Decided Dec. 12, 1989.

Richard T. Cassidy, Burlington, Vt. (Hoff, Agel, Curtis, Pacht & Cassidy, P.C.; Steven Green, Vermont Law School, Chelsea, Vt., American Civil Liberties Foundation of Vermont, Inc., of counsel), for plaintiffs-appellants.

John L. Franco, Jr., Burlington, Vt., Asst. City Atty., Office of City Atty. and Corp. Counsel, for defendants-appellees.

Nathan Lewin, Washington, D.C. (Miller, Cassidy, Larroca & Lewin, of counsel), for Vermont Organization for Jewish Educ.— Lubavitch, amicus curiae.

Before LUMBARD, FEINBERG and MESKILL, Circuit Judges.

FEINBERG, Circuit Judge:

We are called upon once again to consider the constitutionality of the unattended, solitary display on public property of an obviously religious symbol during the Christmas holiday season. This time, however, the symbol on display is not a crèche, as it was when this court last wrestled with the issue,[1] but a menorah. Since our decision in that case, the Supreme Court has decided *County of Allegheny v. ACLU*, ____ U.S. ____, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). Although there are several separate opinions in *Allegheny*, with various concurrences and dissents, we believe that they indicate that the display of the menorah in this case is unconstitutional. Accordingly, for reasons developed more fully below, we reverse the judgment of the United States District Court for the District of Vermount that allowed the display, and remand for entry of judgment for plaintiffs.

I. BACKGROUND

Proceedings in the District Court

Plaintiffs Mark A. Kaplan, Rabbi James S. Glazier and Reverend Robert E. Senghas commenced this action in June 1988 in the district court. Plaintiff Kaplan is an attorney, who resides and practices in Burlington, Vermont; Rabbi Glazier is the rabbi for the Temple Sinai Reform Jewish Congregation in Burlington; and Reverend Senghas was the minister of the First Unitarian Universalist Church of Burlington. Their complaint named the City of Burlington and Robert Whalen, operations manager of the City's Parks and Recreation Department, as defendants. Plaintiffs sought a declaratory judgment

[1] *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), aff'd by an equally divided Court sub nom. *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985).

that the City's grant of a permit for the display of a menorah in City Hall Park would violate the Establishment Clause of the First Amendment, reproduced in the margin.[2] The permit was to be issued to the Vermont Organization of Jewish Education — Lubavitch (Lubavitch), a Vermont group of orthodox Jews. Plaintiffs also sought preliminiary and permanent injunctions against display of the menorah in City Hall Park.

After discovery, the parties entered into a stipulation of facts, pertinent portions of which will be referred to below. Judge Franklin S. Billings, Jr., held an expedited hearing on consent of the parties, after which he issued an oral ruling in defendants' favor. Shortly thereafter, the judge filed a thorough written opinion, dated December 8, 1988, reported at 700 F.Supp. 1315 (D.Vt.). The judge held that the display of the menorah did not violate the Establishment Clause. This appeal followed.

The Facts of the Dispute

The facts set forth below are taken from the stipulation of the parties, the opinion of the district court and the record and exhibits supplied to us by the parties.

City Hall Park, a plot of land containing 2½ acres, is in a prominent location in Burlington. The City has 18 other parks, but as the name suggest, City Hall Park is in front of City Hall, the seat of Burlington city government. City Hall Park is a

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[2] *Congress shall make no law respecting an establishment of religion,* or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I (emphasis supplied). The Establishment Clause has long been held applicable to the States. See *Wallace v. Jaffree*, 472 U.S. 38, 42 n. 10, 48-55, 105 S.Ct. 2479, 2482 n. 10, 2485-89, 86 L.Ed.2d 29 (1985).

traditional public forum, and is frequently used by members of the public for a wide variety of social, artistic, commercial and political events, including fund raising.

There has been a limited history of religious activities in the Park. In the period 1982-1988, the City issued some 13 permits, in addition to those involved in this case, that suggested religious activity in the Park, e.g., permits to the WGLY Radio Station for Gospel message and music; to Roger Foster on behalf of various church organizations for a Jesus rally, with music and testimonies; and to the Maranatha Church for food and clothing distribution to the poor. However, none of these activities involved the use of the Park for as lengthy a period as that at issue here. Also, none of the permits involved display in the Park of an unattended, solitary religious symbol. Indeed, the Park has apparently never been used for this purpose.

The Vermont Lubavitch group is associated with a larger group of Orthodox Jews known as the Chabad Lubavitch, under the spiritual guidance of a respected rabbi who lives in Brooklyn, New York. The Lubavitch movement is a Hasidic sect that seeks to reawaken interest among Jews in traditional Judaism. The local Lubavitch rabbi in Burlington, Yitzchok Raskin, has acknowledged that the Lubavitch movement advocates the display of menorahs all over the country, and has personally participated in efforts to place menorahs on public property in Miami Beach, Florida, and New York City, New York.

A menorah is a religious symbol of the Jewish faith, and is recognized as such by the general public. The menorah is associated with Chanukah, a religious holiday observed by Jews during an eight-day period which ordinarily falls between the latter part of November and the first part of January of each year. A menorah is a nine-pronged candelabra representing

the eight days of Chanukah, with one space for a candle used to light the other eight. "According to Jewish tradition, on the 25th of Kislev in 164 B.C.E. (before the common era), the Maccabees rededicated the Temple of Jerusalem after recapturing it." *Allegheny*, 109 S.Ct. at 3095. Chanukah commemorates this event. Each Chanukah the menorah is lit to celebrate the miracle of a continuously burning light; as the Court explained in *Allegheny*, "[w]hen the Maccabees rededicated the Temple, they had only enough oil to last for one day. But . . . the oil miraculously lasted for eight days (the length of time it took to obtain additional oil)." 109 S.Ct. at 3095. In a letter requesting permission to erect the menorah, the Vermont Lubavitch group described Chanukah as "the festival of lights," and noted that, "[w]e are celebrating the miracle of a small amount of oil lasting eight days." The plain objective of the display of the menorah in City Hall Park is religious.

In December 1986, the Lubavitch group requested permission to erect a menorah in the Park during the celebration of Chanukah. Permission was granted, and the menorah was erected on December 26, 1986 and maintained through January 6, 1987. The menorah, 16 feet high and 12 feet wide, bore a sign, facing only one of the streets forming the Park's boundary. The sign stated "Happy Chanukah" and that the menorah was "Sponsored by: Lubavitch of Vermont." On December 28, 1986, the menorah was lit in City Hall Park in a ceremony attended by over 100 people, held in accordance with the religious customs of Chanukah.

In December 1987, the Vermont Lubavitch group again sought and received a permit, which allowed it to use the "South Lawn Area" of City Hall Park for a "Religious Exhibit — Menorah." The menorah was again erected on December 15 and maintained through December 23, 1987. On December

20, it was lit as in the preceding year. In June 1988, this suit was brought to prevent further permits for the same purpose.[3]

When erected in late 1987, the menorah received widespread press attention, including an article and a photograph in the New York Times of Rabbi Raskin lighting the first candle, with City Hall as a backdrop. The article pointed out that the Lubavitch group had been raising the menorah in the park for four years, but had attracted little attention the first two years because the menorah was up for only one day. The article also noted that Burlington's grant of the permit in December 1987 came only one week after a federal magistrate recommended that a cross be removed from the top of a Christmas tree located on the front lawn of a courthouse in nearby Hyde Park, Vermont, because the presence of the cross violated the Establishment Clause.[4] The menorah became a subject of controversy, the Burlington City Attorney suggested, as a result of the "heightened awareness" of religious symbolism caused by the dispute over the Hyde Park cross.

The three plaintiffs in this action are residents of the area who have been exposed to the menorah in the course of their

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[3]In November 1988, the City again granted permission for the display of the menorah, this time in a different part of City Hall Park. Since the Park encompasses less than a city block, we do not regard the change as significant. In any event, this appeal concerns the placement of the menorah during the 1986 and 1987 seasons, which the district court found permissible. Moreover, as a result of the district court's decision, the City is free to return the menorah to its original location.

[4]See *White v. Village of Hyde Park*, Civ. No. 87-259 (D.Vt. Dec. 10, 1987) (Magistrate's report and recommendation). Subsequently, the parties settled the litigation. As part of the settlement, the Trustees of Hyde Park agreed to no longer place any cross on the Hyde Park Court House lawn. Judge James S. Holden of the district court thereafter approved the stipulation of dismisssal, in a written order. *White v. Village of Hyde Park*, Civ. No. 87-259 (D.Vt. Sept. 14, 1988).

daily activities. Each believes deeply in the principle of separation of church and state, and claims to have suffered mental anguish when confronted with this alleged violation of that principle. Plaintiff Glazier offered the grounds of the synagogue where he officiates, which is private property, as a site for the display of the menorah. The synagogue is located on a heavily traveled highway. Plaintiff Senghas made a similar offer regarding the front lawn of the Unitarian Church.

II. DISCUSSION

The Supreme Court decisions dealing with the vexing question of separation of church and state have been the occasion for the spending of much ink in the opinions themselves and in the inevitable commentary they have evoked. However, in view of the Court's recent decision in *Allegheny*, we do not think it necessary or even appropriate to engage in a lengthy discussion of the Court's many decisions in this area. As already indicated, we believe that *Allegheny*, which was decided after the district court in this case issued its opinion, requires us to reverse the district court.

We are aware that appellees would have a much stronger case were it not for *Allegheny*, because of our own court's decision five years ago in *McCreary*. Indeed, appellees argue that despite *Allegheny*, *McCreary* governs here. In that decision, a panel of this court, relying on the then-recently decided case of *Lynch v. Donnelly*,465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), held that the Village of Scarsdale had to allow a group of private citizens to display a crèche, which was to be placed in the center of the business district in a Scarsdale park, a traditional public forum, during the Christmas holiday season. As indicated above, see note 1 supra, the panel's decision was affirmed by an equally divided Supreme Court. However, for reasons set forth below, we believe that *McCreary* is not dispositive here.

In *Allegheny*, the Supreme Court held that a crèche in a courthouse in Pittsburgh was not permissible, but a menorah in front of a nearby government office building was. The reasoning that led to this apparently disparate result is instructive. Prior to *Allegheny*, as indicated above, the Court had decided *Lynch v. Donnelly*. In that case, the Court by a 5-4 vote had rejected the argument that the display of a publicly-financed crèche, in a private park in a downtown shopping district in Pawtucket, Rhode Island, was an endorsement of the Christian religion and, therefore, a violation of the Establishment Clause. The crèche was part of a larger display, which included, among other things, such traditional figures and decorations as "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree [and] carolers." *Lynch*, 465 U.S. at 671, 104 S.Ct. at 1358. The Court's majority opinion by Chief Justice Burger relied heavily on the context of the display as part of the Christmas holiday season. Id. at 679, 104 S.Ct. at 1362.

Five years later, *Allegheny* posed the issue of two displays on public property in downtown Pittsburgh — one of a crèche standing alone and the other of a menorah next to a Christmas tree. The Court divided sharply on the issues thus raised. There were five separate opinions, joined in whole or in part by various members of the Court.

As we understand those opinions, three members of the Court (Justices Brennan, Marshall and Stevens) would not allow, or would create a strong presumption against, the publicly supported display of obviously religious symbols; they, therefore, held unconstitutional the display of both the crèche and the menorah in *Allegheny*. Two members of the Court (Justices Blackmun and O'Connor) would regard the physical context of the display as most significant; in *Allegheny*, the display of the crèche standing alone within a courthouse was improper, but the display of the menorah, outside a govern-

ment building a block away "next to a Christmas tree and a sign saluting liberty," id. 109 S.Ct. at 3112, was not. Four members of the Court (Chief Justice Rehnquist and Justices White, Scalia and Kennedy) would allow display of a religious symbol so long as it did not "represent an effort to proselytize," id. at 3139; they believed that display of neither the crèche nor the menorah was such an "effort" and therefore should have been allowed.

This variety of views resulted in shifting majorities. With regard to the holding that the crèche, standing alone, violated the Establishment Clause, one portion of Justice Blackmun's opinion represented the majority of himself and Justices Brennan, Marshall, Stevens and O'Connor. With regard to the holding that allowed the display of the menorah, a majority of Chief Justice Rehnquist, and Justices White, Blackmun, O'Connor, Scalia and Kennedy agreed on the result reached in another portion of Justice Blackmun's opinion, but not its rationale.

As we see it, *Allegheny* teaches that the display of a menorah on government property in this case conveys a message of government endorsement of religion in violation of the Establishment Clause. We reach that result for the following reasons. As already indicated, three Justices believe that any display of a religious symbol on public property should be barred, or presumptively barred, and two Justices would rest their decision on the physical context of the display. The facts here with regard to the menorah are very much like those in *Allegheny* with regard to the crèche. The menorah, like the crèche in that case, is displayed alone on public property closely associated with a core government function. In *Allegheny*, the crèche was inside the County Courthouse; here, the menorah is right in front of City Hall — the very phrase "is commonly used as a metaphor for government." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987).

Indeed, the two members of the Court in *Allegheny* who engaged in intensive fact-specific analysis indicated that a menorah standing alone would be improper. See *Allegheny*, 109 S.Ct. at 3113 n. 64 ("The display of a menorah alone may well have [the] effect [of endorsing Judaism]. . . .") (Blackmun, J.); id. at 3123 ("A menorah standing alone at city hall might well send such a message [of endorsement] to nonadherents [of Judaism].") (O'Connor, J.).

The menorah, like the crèche, is clearly a religious symbol. All of the Justices in *Allegheny* agreed upon that, although some apparently believed that the menorah is also a symbol of a religious holiday that over time has acquired a secular component. Although there may be many — Jews and non-Jews — who would disagree with the apparent suggestion that a menorah itself has significant secular import, or that December is the significant holiday season for Judaism, we do not regard that as an important factor here. The parties in this case have stipulated that the menorah is a religious symbol "recognized as such by the general public," and the menorah here, unlike the menorah in *Allegheny*, was displayed alone so that there was nothing to indicate that the thrust of its message was secular rather than religious.

Appellees argue that there is an implied City disclaimer of sponsorship of the menorah here because it bears the legend that the display is sponsored by the Lubavitch group. However, the creche in *Allegheny* bore "a plaque stating: 'This Display Donated by the Holy Name Society,'" id. 109 S.Ct. at 3094, but that did not alter the result there. Id. at 3104.[5]

[5]Even if this display had been accompanied by an express disclaimer of City sponsorship and approval, the pervasive message of government endorsement communicated by this context would not be negated. City Hall is closely identified with this particular city park, as its very name and proximity to the seat of municipal authority suggest. In these circumstances, "'a disclaimer of the obvious is of no significant effect.'" *American Jewish Congress*, 827 F.2d at 128 (citation omitted).

Moreover, the facts here regarding the religious thrust of the Lubavitch message are, if anything, apparently stronger than in *Allegheny*. In two successive years the menorah candles were lit in a religious ceremony in the Park attended by many people. While there was "some evidence" that this also occurred in *Allegheny*, Justice Blackmun (part of the six-person majority allowing the menorah display) refused to consider that factor because, among other reasons, the court of appeals had not. Id. at 3115 n. 70. In contrast, we do consider the religious ceremony and regard it as quite significant.

In one respect, however, the facts in this case differ from *Allegheny* and thus arguably suggest a different result. Unlike the County Courthouse, where the crèche in that case was located. see *Allegheny*, id. at 3104 n. 50, City Hall Park is indisputably a traditional public forum. Appellees argue that the Lubavitch have an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park, limited only by narrow time, place and manner regulations. If this were so, however, the public forum doctrine would swallow up the Establishment Clause. That this is not so is clear, since the existence of a public forum began, rather than ended, the Supreme Court's analysis in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), upon which the Lubavitch group relies heavily in its amicus brief. In that case, the Court considered whether a state university that made its facilities generally available for the activities of registered student groups could close the facilities to such groups desiring to use the facilities for religious worship and religious discussion. The Court held that the university, "[h]aving created a forum generally open to student groups," could not now "seek[ ] to enforce a content-based exclusion of religious speech." Id., 454 U.S. at 277, 102 S.Ct. at 278. We believe that the present case is distinguishable from *Widmar*, since the City, prior to the grant of the permits for the display of the menorah, had not created a forum in City Hall Park open to the unattended, solitary display of religious symbols. Other than the menorah in question, no permits had

been issued for the unattended display of any religious symbol in the Park.

Moreover, even if the City, by granting permits in the past for uses suggesting religious activity, may be deemed to have created a forum open to religious symbols, its grant of a permit in this case would nevertheless violate the Establishment Clause. The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement. See *Widmmar*, 454 U.S. at 273-75, 102 S.Ct. at 276-77. Here, unlike in *McCreary*, the park involved is not any city park, but rather City Hall Park. This Park is bounded on the east by City Hall, the seat and the official simbol of Burlington city government. During the years in issue, 1986 and 1987, the menorah was located only some 60 feet away from the westerly steps of City Hall; from the general direction of the westerly public street, the menorah appeared superimposed upon City Hall. In light of these facts, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." *Allegheny*, 109 S.Ct. at 3104. It is true that the district court reached a different conclusion in this respect, but we believe that it was mistaken as a matter of law. See *Lynch*, 465 U.S. at 693-94, 104 S.Ct. at 1369-70 (O'Connor, J., concurring) ("But whether a government activity communicates endorsement of religion is not a question of simple historical fact. . . . [T]he question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts.").

Thus, here, unlike in *Widmar*, the City's equal-access policy is incompatible with the Establishment Clause. Central to the Court's conclusion in *Widmar* that an equal-access policy on the part of the university would not violate the Establishment Clause was the factor that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," any more than such a policy confers approval on such eligible groups as the "'Students for

a Democratic Society [or] the Young Socialist Alliance.'" 454 U.S. at 274, 102 S.Ct. at 276 (citation omitted). The same cannot be said of the City's permission to display an unattended, solitary religious symbol in City Hall Park, given that Park's close association with the seat of city government, as underscored by the City's need to call a press conference disavowing City responsibility for the menorah. Indeed, the City Attorney acknowledged that "last year we had to say that [the menorah was not sponsored by the City] so often that it became ours in some people's minds." Thus, while previous apparently noncontroversial, uses of the Park suggesting religious activity could be clearly tied to a speaker, the display of this unattended, solitary, semi-permanent symbol could not; and in the absence of a live speaker to whom responsibility could be attributed, the City was perceived as fulfilling the role of sponsor.

Finally, a prohibition on the display of unattended, solitary religious symbols would not run afoul of the constitutional requirement that "content-based exclusions" be "necessary to serve a compelling state interest" and be "narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270, 102 S.Ct. at 274. Observance of the constitutional mandate of the Establishment Clause may properly be characterized as a compelling governmental interest, see id. at 271, 102 S.Ct. at 275, and a prohibition limited to displays of unattended, solitary religious symbols on public property would be narrowly tailored to serve that end, since it would allow the continued use of City Hall Park for all other uses.

In short, we believe that if the unattended, solitary display of a creche in *Allegheny* was impermissible on the facts of that case, the unattended, solitary display of the menorah here must also be barred.

Although we believe our result is compelled by *Allegheny*, we do not reach it reluctantly. While the motive of the City of Burlington in issuing the permits to the Lubavitch group

was doubtless benign, even commendable, that does not dispose of the case before us. What must be considered is the effect of a semi-permanent display in the Park in front of City Hall of a concededly religious symbol. Obviously, few — if any — of the citizens of Burlington will feel threatened by the unattended, solitary display of a religious symbol of a minority faith. But, if that is allowed, it would also seem permissible to display, standing alone, a symbol of the majority faith — a crèche or a cross — and this could well lead members of minority religions or nonbelievers to think that "'adherence to a religion'" was relevant to "standing in the political community.'" *Allegheny*, 109 S.Ct. at 3101 (quoting *Lynch* 465 US. at 687, 104 S.Ct. at 1366 (O'Connor, J., concurring)). Cf. *Friedman v. Board of County Commissioners*, 781 F.2d 777, 779, 781-82 (10th Cir. 1985) (in banc) (official county seal bearing Latin cross and Spanish motto, translated as "With This We Conquer," prominently displayed on county vehicles and to identify law enforcement officers would have a "threatening connotation" for non-Christians), cert. denied, 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 978 (1986). Moreover, the display of a minority religious symbol can be disturbing, even if not threatening, to members of the majority faith and to others. It apparently was in this case, since the record suggests that complaints arose from a perceived disparity of treatment. We believe that refusing to allow the unattended, solitary display of such emotion-laden religious symbols as a crèche, a cross or a menorah on public property and encouraging the placement of them instead in places of worship and in the home will, in the long run, tend to diminish "unintended divisiveness." *Allegheny*, 109 S.Ct. at 3132 n. 10 (Stevens, J.).

Justice O'Connor pointed out in *Allegheny* that "[w]e live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all." 109 S.Ct. at 3119. The Constitution, as it has developed over the years through decisions of the Supreme Court, has allowed Americans of all faiths and of no faith to reach a fragile ac-

commodation in the sensitive area of separation of church and state. Despite the obvious good intentions of the City of Burlington, that accommodation would be hindered, not helped, by grant of the permit in this case.

For the reasons set forth above, we reverse the judgment of the district court and remand for entry of judgment for plaintiffs.

MESKILL, Circuit Judge, dissenting:

The issue presented by this appeal is whether a municipality may allow a private group to display a menorah accompanied by a sign identifying the private sponsorship of the menorah in a public park adjacent to City Hall. The resolution of this issue calls for a delicate balancing of individuals' right to religious expression with the proscription against the government's establishment of religion. Because I believe that on the facts of this case, the former prevails over the latter, I respectfully dissent.

The analysis of the menorah display must begin with the premise that the denial of permission to erect the menorah is a content-based restriction on religious expression in a public forum. Such restrictions of expression in a public forum receive especially careful scrutiny. *See Boos v. Barry*, 485 U.S. 312, 321-22, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988. Content-based restrictions must fall before the First Amendment unless they are necessary to serve a compelling governmental interest and are narrowly drawn to achieve that interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983); *Widmar v. Vincent*, 454 U.S. 263, 270, 102 S.Ct. 269, 274, 70 L.Ed.2d 440 (1981). It is significant that *County of Allegheny v. American Civil Liberties Union*, — U.S. ___, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), to which the majority properly looks for guidance, did

not raise the issue of individual religious expression in a public forum. *Id.* 109 S.Ct. at 3104 n. 50; *see McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985).

Public parks, like streets and sidewalks, historically "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939); *accord United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (183); *Hudgens v. NLRB*, 424 U.S. 507, 515, 96 S.Ct. 1029, 1034, 47 L.Ed.2d 196 (1976). These places "occup[y] a special position in terms of First Amendment protection and will not lose [their] historically recognized character for the reason that [they] abut[ ] government property that has been dedicated to a use other than as a forum for public expression." *Grace*, 461 U.S. at 180, 103 S.Ct. at 1708.

The parties, recognizing the obvious nature of City Hall Park, agree that the park is a traditional public forum. In *Widmar v. Vincent*, the Supreme Court concluded that a state university, having created a public forum for student groups, could not exclude from that forum expression based on its religious content. 454 U.S. at 277, 102 S.Ct. at 278. The majority, however, raises a doubt about the import of City Hall Park's status as a public forum. Instead, it seeks to distinguish *Widmar* from the case now before us by concluding that the City of Burlington (City), by permitting certain prior religious uses of the park, has "not created a forum in City Hall Park open to the unattended, solitary display of religious symbols."

The majority's attempted distinction, in my view, misses the main point of *Widmar*. The park's status as a public forum does not depend upon whether the City has in the past permitted a particular type of speech or form of expressive conduct, as the majority suggests. City Hall Park is an

acknowledged traditional public forum, a place where individuals are permitted to speak and express themselves, subject to reasonable time, place and manner restrictions. *See Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. at 954. The proper question is whether they City may exclude from this place that historically has been held open for free expression a category of speech based on its content. The answer to that question cannot depend solely on whether the expression is attended or unattended. The answer lies in assessing whether the City, by permitting a private group to erect a menorah in a public forum, has conveyed a message of endorsement of religion in violation of the Establishment Clause.

At least as it has been displayed in City Hall Park, the menorah clearly is a religious symbol and the message of the display is a religious one. This, however, is only the beginning of the inquiry. The display of a religious symbol violates the Establishment Clause if the display conveys a message of governmental endorsement of religion. *Allegheny County*, 109 S.Ct. at 3100; *see also Edwards v. Aguillard*, 482 U.S. 578, 593, 107 S.Ct. 2573, 2583, 96 L.Ed.2d 510 (1987); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389-92, 105 S.Ct. 3216, 3225-27, 87 L.Ed.2d 267 (1985); *Stone v. Graham*, 449 U.S. 39, 41-42, 101 S.Ct. 192, 193-94, 66 L.Ed.2d 199 (1980) (per curiam). Careful consideration must therefore be given to the specific factual context of the display. *See Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S.Ct. 1355, 362, 79 L.Ed.2d 604 (1984).

It is no small significance that the menorah displayed in City Hall Park was owned, erected, maintained, and removed by a private group with no actual contribution or support, financial or otherwise, from the City, except in the form of the issuance of a permit. *See Allegheny County*, 109 S.Ct. at 3097 (privately owned menorah stored, erected, and removed by city, and included in city's holiday display); *Lynch*, 465 U.S. at 671, 104 S.Ct. at 1358 (city-owned Christmas display, including crèche, erected on private property). The City thus

has not *in fact* sponsored or endorsed the menorah display. The only question is whether a reasonable viewer would *perceive* the City as endorsing the display.

The relatively short time period that the menorah was displayed also deserves note. It is not a permanent fixture in City Hall Park. Instead, it was displayed for only twelve days in 1986, and only nine days in 1987, during the holiday season of Chanukah.

Of paramount significance, however, is the location of the display in a traditionall public forum. Neither the creche nor the menorah in *Allegheny County* was displayed in a public forum. In fact, the creche was placed inside the County Courthouse in a location where private displays were not ordinarily permitted and "[n]o viewer could reasonably think that it occupie[d the space] without the support and approval of the government." *Allegheny County*, 109 S.Ct. at 3104. By contrast, the menorah in City Hall Park was not overwhelmingly surrounded by the indicia of governmental authority. The only substantial connection between the menorah display and the government was the location of City Hall adjacent to the park.

The majority emphasizes this proximity of the park to and its connection with City Hall, as reflected in the park's name. In particular, the majority stresses that in 1986 and 1987, the menorah was located approximately sixty feet away from the steps of City Hall and that, when viewed from the west side of the park, the menorah was seen against the backdrop of City Hall.[1] To rest constitutional adjudication on the compass heading of the viewer trivializes the importance of the principles involved. *See id.* at 3144 (Kennedy, *J.*, concurring in judgment in part, dissenting in part) (decrying the reliance on a "jurisprudence of minutiae"). Viewed from a different side of the park, the menorah would be superimposed against a

[1]In 1988, the City required that the menorah be placed in the northeast quadrant of the park, so that when viewed from the west side of the park it would be seen with the Merchants-Bank building in the background.

bank, a restaurant, or a vacant lot. No reasonable person would suggest that the bank or the restaurant endorses the menorah simply because either one can be seen in the menorah's background.

Permitting religious speech in a public forum in and of itself "does not confer any imprimatur of state approval on religious sects or practices" any more than permitting political speech conveys governmental endorsement of a political group. *Widmar*, 454 U.S. at 274, 102 S.Ct. at 276. Indeed, the fact that the display is in a public forum in which a wide variety of other kinds of speech and expression takes place is a factor negating governmental endorsement of the religious message of the display. *Id.* at 274-75, 102 S.Ct. at 276-77. Moreover, I cannot agree that merely because City Hall is located on one side of the park, which is also surrounded by a host of sundry businesses and shops, the park loses its special status as a traditional public forum. *Cf. Grace*, 461 U.S. at 179-80, 103 S.Ct. at 1708-09. The record illustrates that the park has been used for a wide variety of expressive purposs, some attended and some unattended. The display of the menorah should be viewed as just part of this diverse group of uses of the park.

The majority also contends that the display of the unattended menorah, unlike other religious uses of the park in which live speakers are present to whom the religious expression can be attributed, results in the perception that the City is the sponsor of the menorah. The menorah display, however, has something that fulfills the role of the live speaker in identifying the sponsor of the display: a sign. The sign, which the district court found was visible for some distance when viewed from the west side of the park, stated that the menorah was sponsored by "Lubavitch of Vermont." We can assume that anyone who is interested in determining the sponsorship of the menorah would read the sign.

Likening the sign here to that accompanying the creche in *Allegheny County*, the majority maintains that the sign had no

effect on the appearance of governmental endorsement of the menorah display. In *Allegheny County*, the crèche display included a plaque stating that the display had been donated by the Holy Name Society. 109 S.Ct. at 3095. Because the creche, which was located inside the County Courthouse, was so overwhelmingly surrounded by the presence of government, the sign could not dispel the perception of the government's endorsement of the crèche. *Id.* at 3105. Nevertheless, "[w]hile no sign can disclaim an overwhelming message of endorsement, . . . an "explanatory plaque' may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." *Id.* at 3114-15 (citation omitted). The sign accompanying the menorah in this case adequately serves to identify the sponsor of the display and contradicts any notion of City sponsorship arising out of the location in City Hall Park. The majority nonetheless contends that the message of the menorah display is equally if not more deeply religious in content than that conveyed by the crèche in *Allegheny County*, and that therefore the sponsorship sign should be accorded no significance. The purpose of the sign, however, is not to negate the religious message of the display; rather, it is to negate the message of governmental endorsement of the religious symbol. With the crèche in *Allegheny County*, this was not possible because of the pervasive governmental presence at the crèche's location. That pervasiveness is substantially diminished in a traditional public forum that happens to be adjacent to City Hall. The sponsorship sign, therefore, effectively negates any hint of governmental endorsement that a viewer might "perceive."

I am also unpersuaded that this conclusion should be altered because the City received complaints about the menorah display and felt compelled to respond to those complaints in a press conference. The angry objections of a handful of citizens is of little significance when considering whether the display of a religious symbol *objectively* conveys a message of

governmental endorsement. *See American Jewish Congress v. City of Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, *J.*, dissenting) ("It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with . . . witnesses testifying they were offended — but would have been less so were the creche five feet closer to the jumbo candy cane."). Furthermore, I would not view the factual context of this case any differently if the City had remained entirely silent in the face of the complaints. It seems almost nonsensical to conclude that the claimed governmental endorsement of the menorah is bolstered by the City's decision to affirm publicly that it did not sponsor or have any other connection with the menorah.

The erection of a privately owned and maintained religious symbol, accompanied by a sign identifying its sponsor, for a relatively short period of time in a traditional public forum does not convey a message of governmental endorsement of religion merely because the forum is located next to City Hall. Rather, the denial of permission to display the menorah would constitute unnecessary hostility toward religion. Permitting the display does not violate the Establishment Clause; denying access to the traditional public forum, in contrast, would treat religious expression differently from other forms of protected expression without any compelling justification for doing so. *See Widmar*, 454 U.S. at 269 & n. 6, 102 S.Ct. at 274 & n. 6. The First Amendment does not countenance such discrimination on the basis of the content of expression.

For these reasons, I would affirm the judgment of the district court and respectfully dissent.